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of the mortgage-debt, is entitled to contribution from the other holders for the amount paid by him in excess of his share, and to a charge for that amount on their shares of the mortgaged property. The total amount of the mortgage-debt was Rs. 13,943-10-6. Out of this amount Rs. 3,000 was realized by the sale of the mortgaged share in Bhojpur purchased by the mortgagees. The share purchased by the plaintiff was liable for one-fifth of the balance. He has therefore paid for the sons and grandsons the sum by which Rs. 12,000 exceeds that one-fifth. This excess amount, which is really more than the Rs. 9,500 claimed in the suit, he is, in our opinion, entitled to recover from the sons and grandsons of Shib Singh, and their four-fifths share of the mortgaged property, together with interest at the rate provided in the mortgage.

The result is that we allow the appeal, set aside the decree of the Court below, and make a decree in the terms of section 88 of the Transfer of Property Act in favour of the plaintiff for Rs. 9,600, with interest thereon at the mortgage rate of one rupee per cent. per mensem from 20th June, 1895, the date of confirmation of the sale at which the plaintiff purchased, to the date of payment, and costs in the Court below and this Court, to be recovered by sale of the rights and interests of the third set of defendants in the $8\frac{1}{4}$ -biswa share, unless paid on or before the 16th October, 1901. The appeal is dismissed with costs against the first set of defendants.

Decree modified.

Before Mr. Justice Banerji.

BARU MAL AND OTHERS (PLAINTIFFS) v. NIADAR (DEFENDANT)*

Act No. XII of 1881 (North-Western Provinces Rent Act), sections 93, 95—Jurisdiction—Civil and Revenue Courts—Suit to eject as a trespasser a person who claimed to be entitled to succeed to the holding of a deceased occupancy tenant.

Upon the death of an occupancy tenant a person who alleged that he was entitled to succeed the deceased in his holding obtained mutation of names in his favour and also got possession of the holding. The zamindars thereupon

* Second appeal No. 915 of 1900 from a decree of Pandit Girraj Kishore Datt, Additional Subordinate Judge of Saharanpur, dated the 26th July 1900, confirming a decree of Babu Chajju Mal, Munsif of Saharanpur, dated the 14th June 1900.

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brought a suit in the Civil Court for ejectment of such person as a trespasser who had no right whatever to succeed to the holding of the late occupancy tenant. *Held* that such a suit was properly brought in a Civil Court, and could not have been instituted in a Court of Revenue; and further, that the decision of the Court of Revenue allowing mutation of names in the defendant's favour could not operate as *res judicata* in respect of the present suit. *Subarni v. Bhagwan Khan* (1) distinguished; *Sheo Narain Rai v. Parmeshar Rai* (2), *Dulhna Kuar v. Unkar Pande* (3) and *Kaliani v. Dassu Pande* (4) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, for the appellants.

Babu *Satya Chandra Mukerji*, for the respondent.

BANERJI, J.—The suit which has given rise to this appeal was brought by the appellants, who are zamindars, for recovery of possession of certain lands and for ejectment of the defendant therefrom. The said lands formed the occupancy holding of one Gulzara. He died in November, 1899, and thereupon the defendant applied to the Revenue authorities under section 102 of Act No. XIX of 1873 for the entry of his name. An order was made on the 11th February, 1900, for the entry of the defendant's name in the place of Gulzara. The defendant is now in possession. The plaintiffs allege that the defendant has no right to succeed to the holding of Gulzara and that he is a trespasser. The Courts below have dismissed the suit on the ground that the cognizance of it by a Civil Court is barred by the provisions of the Rent Act, and that the plaintiffs' remedy was in a Court of Revenue. The plaintiffs have preferred this appeal, and it is contended that the suit was cognizable by the Civil Court. In my opinion the contention must prevail. By section 93 or section 95 of Act No. XII of 1881 the cognizance of the Civil Court is forbidden in respect of any dispute or matter in which a suit could be brought under the former section or an application made under the latter section. We have therefore to see whether a suit, or an application of the nature specified in sections 93 and 95, could have been instituted by the plaintiffs for the relief which they seek in the present suit. There can be no doubt, as observed by the Full

(1) (1896) I. L. R., 19 All., 101.

(2) (1896) I. L. R., 18 All., 270.

(3) (1897) I. L. R., 19 All., 452.

(4) (1898) I. L. R., 20 All., 520.

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Bench in *Sheo Narain Rai v. Parmeshar Rai* (1), that Act No. XII of 1881 provides no means by which a zamindar can obtain ejection from his land of a trespasser, and that for the ejection of a trespasser recourse must be had to a suit in a Civil Court. If the defendant is, as the plaintiffs allege, a trespasser and not the tenant of the land in suit, the only Court in which the plaintiffs could seek this remedy for the ejection of the defendant is the Civil Court. As he does not admit that the defendant is his tenant, he could not have made an application under section 95 to eject him under section 35 or 36. Those sections provide for the ejection of a person who is a tenant, that is to say, is admitted or proved to be a tenant. He could not have made an application under section 10, as such an application can only be made by a tenant, and I have not been referred to any other provision of the Rent Act under which the plaintiffs could apply to the Revenue Court to eject the defendant. As the defendant is in possession, he could not have preferred an application under section 95(n), and it does not appear that he could have applied under any other clause of the section. Therefore this is not a case in which a suit could be brought or an application made under section 93 or section 95 in regard to the matter which is in controversy. That being so, the only Court in which the plaintiffs could bring their suit was the Civil Court. In *Dulchna Kuar v. Unkar Pande* (2) it was held that where the plaintiff could not, upon the allegations made by him in his plaint, have obtained relief from a Court of Revenue, a Civil Court was competent to entertain the suit and to give the plaintiff a decree for possession as against the defendant. The same view was held in the subsequent case of *Kaliani v. Dassu Pande* (3). The Courts below have relied upon the Full Bench decision in *Subarni v. Bhagwan Khan* (4). It is on that ruling that the learned vakil for the respondent mainly relies. That was a case in which a person who alleged himself to be the tenant of the holding had asked the Court of Revenue "for possession of the occupancy holding as an occupancy tenant in succession to her parents," and the suit was brought by the zamindars in the Civil

(1) (1896) I. L. R., 18 All., 270.

(2) (1897) I. L. R., 19 All., 452.

(3) (1898) I. L. R., 20 All., 520.

(4) (1896) I. L. R., 19 All., 101.

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Court for a declaration that the defendant was not the tenant of the holding, and that the plaintiffs, the zamindars, were in possession and were entitled to the holding. That was not a case like the present, in which the plaintiff seeks to eject the defendant. It was held in that case that the dispute was one in which "an application might have been made, and was in substance made, under section 95 of Act No. XII of 1881." As I have already stated, the defendant in the present suit being in possession could not have made an application to the Court of Revenue under that section. The application he did prefer to the Revenue Court was in terms an application under section 102 of Act No. XIX of 1873. The order which was passed on that application also purported to be an order under that section, and was founded on the fact that the defendant was in possession. Such being the case, the Full Bench ruling referred to above is inapplicable, and the present suit did not relate to a matter in respect of which the cognizance of the Civil Court is excluded by any provision of Act No. XII of 1881. It is urged that the order of the Revenue Court directing the entry of the defendant's name has the effect of *res judicata* upon the question of title. I am unable to agree with this contention. An order under section 102, which must be read with section 64, is based upon the fact of possession, and cannot be deemed to be an order which decides a question of title. This was held in *Kabiani v. Dassu Pande* (1), and I see no reason to depart from the view which was taken in that case. In my opinion the Courts below were wrong in throwing out the suit. I allow the appeal, set aside the decrees of the Courts below, and remand the case under section 562 of the Code of Civil Procedure to the Court of first instance for trial on the merits. The appellants will have their costs of this appeal. Other costs will follow the result.

(1) (1898) I. L. R., 20 All., 520.